



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

Application of Curtis Gehling and Dennis Schwab
for a Permit to Construct a Bridge to an Island in
Explosion Lake, Town of Townsend, Oconto
County, Wisconsin

Case No. 3-NE-97-093UG

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Curtis Gehling and Dennis Schwab, 2129 Jackson Street, Oshkosh, Wisconsin, 54901, applied to the Department of Natural Resources for a permit to construct a bridge greater than 35 feet over Explosion Lake. The proposed bridge is to be a treated-timber bridge to span the channel between the mainland and an island in Explosion Lake. The proposed purpose of the bridge is to allow vehicular and pedestrian traffic to the island. The proposed project is located in the SW ¼ of the NE ¼ of Section 29, Township 33 North, Range 15 East, Town of Townsend, Oconto County, Wisconsin.

The Department of Natural Resources issued a Notice of Proposed Bridges/Culverts which stated that unless written objection was made within 30 days of publication of the Notice, the Department might issue a decision on the permit without a hearing. The Department received several timely objections to the permit application.

Pursuant to due notice hearing was held on May 3, 1999, at Oconto, Wisconsin, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Curtis Gehling and Dennis Schwab, by

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FINDINGS OF FACT

1. Curtis Gehling and Dennis Schwab, 2129 Jackson Street, Oshkosh, Wisconsin, 54901, completed filing an application with the Department for a permit under sec. 30.123, Stats., to construct a bridge over Explosion Lake, Town of Townsend, Oconto County. The Department and the applicants have fulfilled all procedural requirements of secs. 30.123 and 30.02, Stats.

2. The applicants own real property located in the SW ¼ of the NE ¼ in Section 29, Township 33 North, Range 15 East, Town of Townsend, Oconto County. The above-described property abuts Explosion Lake, which is navigable in fact at the project site.

3. The applicants propose to construct a treated-timber bridge to span the channel between the mainland and an island (owned jointly by the applicants) in Explosion Lake. The bridge would be approximately 60 feet long and 23 feet wide.

4. The purpose is to allow for vehicles to reach the island in Explosion Lake. The partners hope to plat the island to accommodate up to seven residential lots. The proposed plat has not yet been approved by any local governments. While the applicant has accordingly not fully demonstrated the need for this bridge, the proposed permit condition requiring the applicant to obtain a building permit prior to construction of the bridge would address this concern.

5. The proposed structure will "materially obstruct existing navigation" on Explosion Lake and will be "detrimental to the public interest" within the meaning of sec. 30.123(4), Stats.

6. Explosion Lake is a natural seepage lake and part of a chain of five lakes which consists of Upper and Lower reservoir pond(s), and Horn, Little Horn and Explosion Lake(s). (Ex. 15) The natural aquatic system has been expanded by placement of a dam at the downstream end of the chain. This has resulted in shallower near shore areas and deeper central basins in the lakes. Many tree stumps remain in the near shore areas, remnants of the older shoreline. (Ex. 23) The mainland shoreline is a mixture of wetland and upland plant communities, but the proposed project does not involve the filling of any wetland areas. The island consists of approximately eight acres, some 1300 feet long and up to 350 wide. The island shoreline has a pristine and wild appearance.

7. The proposed bridge would have a minimal direct effect on wildlife habitat but would have some secondary impact if it allows for development of residential lots on the island. The island is home to many small amphibians, small furbearers, and numerous bird and duck species including nesting loons and bald eagles. However, the impacts to wildlife would not be sufficient to deny the permit application.

Both DNR Area Water Management Specialist Robert Rosenberger and the applicant's expert, Dr. William Sloey, provided undisputed expert testimony that direct impacts to wildlife attributable to construction of the small bridge would be negligible. Specifically, Dr. Sloey was persuasive that the project would have no impact on the nesting loon populations.

8. The proposed bridge would not obstruct navigation of most of the small watercraft which regularly make use of Explosion Lake. This portion of the lake and channel is full of tree stumps and only suitable for navigation by smaller, slower craft. The permit application provides for an eight-foot high clearance area between the water and the lower portion of the bridge. However, John Peil testified persuasively that this would not allow sufficient clearance for the weed-cutter that is used at that end of the lake. Peil opined that it would require a 13-foot clearance to safely navigate the weed-cutter under the bridge. Accordingly, the applicant has not carried its burden of proving that the bridge would not materially obstruct navigation within the meaning of sec. 30.123, Stats.

9. The channel where the proposed bridge would be constructed is man-made, but has a very natural, highly-vegetated appearance. Numerous boaters testified of the extraordinary and pristine natural scenic beauty of the area. Further, this area is the last remaining natural appearing remnant of shoreline accessible to boats using the public waters of Explosion Lake. Numerous witnesses testified that the channel was a "destination" area for boaters wanting to enjoy the beauty and serenity of the quiet natural channel area and that the bridge would have a detrimental impact on the public interest in maintaining this rare and beautiful resource.

The large number of boaters testifying of their love for this unique stretch of natural-appearing shoreline reflect literally the public interest in maintaining natural scenic beauty. While the proposed bridge is to be made of timber and other natural-appearing materials, it will destroy the natural quality of the channel. The ALJ finds that construction of the bridge would destroy the last small stretch of natural appearing shoreline and would, therefore, be detrimental to the public interest in maintaining natural scenic beauty.

10. While the permit application could be amended to raise the bridge sufficiently (approximately five feet) to allow for clearance of the weed-cutter, to do so would only add to the detrimental impact on natural scenic beauty. A thirteen-foot clearance would involve construction of a much larger bridge.

11. There are other islands in the chain of lakes area that would likely be developed if similar bridge projects were approved. (Ex. 14) The project would likely lead to detrimental cumulative impacts to the public interest in maintaining natural scenic beauty in the area.

12. The applicants are financially capable of constructing, maintaining, monitoring or removing the structure if it should be found in the public interest to do so.

13. The proposed structure will not reduce the effective flood flow capacity of Explosion Lake upon compliance with the conditions in the permit.

14. The proposed bridge would not adversely affect water quality nor will it increase water pollution in Explosion Lake. The bridge would not cause environmental pollution as defined in sec. 283.01(13), Stats.

15. The Department of Natural Resources has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Adm. Code, regarding assessment of environmental impact.

DISCUSSION

The public interest in public waters includes the enjoyment of natural scenic beauty and a Chapter 30 permit may be denied solely on its detrimental impact on natural scenic beauty. Clafin v. DNR, 58 Wis. 2d 182, 206 N.W.2d 392 (1973) It is a rare case when impacts to natural scenic beauty alone are sufficient to deny a permit. This is such a case. Dozens of members of the public appeared at hearing, several bringing photographs. Numerous witnesses testified to the rare beauty of the channel area. (See: Exs. 17-19; 24; 25 & 26) Several witnesses testified that the channel was the last remaining natural appearing shoreline accessible by boat on Explosion Lake or any of the chain of lakes to which it is connected. Several witnesses testified that the area "looked like Canada," because of its pristine appearance. There was a time when people spoke of northern Wisconsin as a similar short-hand for a pristine and natural area. The remaining natural areas of the state are "precious resources" to members of the public utilizing public waters. As the Wisconsin Supreme Court held in Clafin: "The natural beauty of our northern lakes is one of the most precious heritages Wisconsin citizens enjoy. It is entirely proper that natural beauty should be protected as against specific structures that may be found to mar that beauty." Id. at p. 193

Further, the DNR and the Division must consider the cumulative impacts of permitting structures under Chapter 30, Stats. Hixon v. Public Service Commission, 32 Wis. 2d 608, 619, 631-632, 146 N.W.2d 577 (1966). Numerous witnesses expressed concern that if the instant permit application were approved, others could seek to build bridges to the islands on this watershed. This fact was expressly demonstrated by Ex. 14, where the DNR acknowledged that "... the Department has received inquiry to construct another bridge in the area."

The Hixon court eloquently expressed the concern of cumulative impacts of many small projects on our public natural resources:

There are over 9,000 navigable lakes in Wisconsin covering an area of over 54,000 square miles. A little fill here and there may seem to be nothing to become excited about. But one fill, though comparatively inconsequential, may lead to another, and another, and before long a great body of water may

be eaten away until it may no longer exist. Our navigable waters are a previous natural heritage; once gone, they disappear forever.

One small bridge changing the character of one beautiful, peaceful natural area on Explosion Lake is relatively inconsequential. However, in light of its direct and cumulative impacts the instant project is detrimental to the public interest in navigable waters and must be denied.

Further, the current plans for the bridge would materially obstruct navigation and make it difficult or impossible to safely operate the weed-cutter under the bridge. Raising the height of the bridge would add to the detrimental impact to natural scenic beauty.

CONCLUSIONS OF LAW

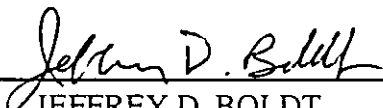
1. The applicants are riparian owners within the meaning of sec. 30.12, Stats.
2. The proposed facility described in the Findings of Fact constitutes a bridge greater than 35 feet wide within the meaning of sec. 30.123(3), Stats.
3. The Division of Hearings and Appeals has authority under secs. 30.123 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue or deny a permit for the construction and maintenance of said bridge.
4. The proposed bridge will "materially obstruct navigation" on Explosion Lake within the meaning of sec. 30.123(4), Stats., because it will not allow sufficient clearance for weed-cutters to pass under the bridge. The bridge would not materially obstruct navigation if it were raised five feet to allow passage of the weed-cutter.
5. The proposed bridge will be "detrimental to the public interest" within the meaning of sec. 30.123(4), Stats., in natural scenic beauty because the bridge will detrimentally impact the only natural-appearing vista accessible to members of the public navigating the public waters of Explosion Lake.
6. Specific structures may be determined to be "detrimental to the public interest" within the meaning of Chapter 30, Stats., on the ground that they impair natural beauty. This is a proper basis for denial of a permit. Claflin v. DNR, 58 Wis. 2d 182, 206 N.W.2d 392 (1973). The proposed project would be detrimental to the public interest in natural scenic beauty.
7. An applicant for a Chapter 30, Stats., permit has the burden of proving compliance with statutory requirements. Village of Menomonee Falls v. DNR, 140 Wis. 2d 579, 605, 412 N.W.2d 505 (Wis. Ct. App. 1987).
8. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Adm. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

ORDER

WHEREFORE, IT IS HEREBY ORDERED that the permit to construct a bridge be DENIED for failure to meet the standards set forth in sec. 30.123(4), Stats.

Dated at Madison, Wisconsin on May 14, 1999.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By 
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.